DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, Judge

CA05-1131

JUNE 28, 2006

CHARLES MOODY

APPELLANT

v.

LONNIE MCNATT; KATHY MCNATT and SHARI MOODY

APPELLEES

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[DR2003-360]

HONORABLE MACKIE MCCLELLAN PIERCE, CIRCUIT JUDGE

AFFIRMED

This appeal arises from the enforcement of a maternal-grandparent visitation order entered after the death of the custodial mother. Appellant Charles Moody, the child's natural father, appeals the trial court's decision asserting six points of error: (1) The trial court failed to correctly apply the legal standards required to find that appellant was in contempt in regard to allowing telephone contact between appellees and the child; (2) The trial court failed to correctly apply the legal standards required to find that appellant was in contempt for failing to arrange counseling for the child in a timely manner; (3) The trial court erred in not entering an order prohibiting appellees from contacting appellant's employer in the future; (4) The trial court erred in ruling that statements of the child to day care workers were inadmissible as hearsay; (5) The trial court erred in admitting hearsay documents offered by appellees, while excluding hearsay documents offered by appellant, creating the appearance of bias; (6) The trial court failed to consider the applicable legal criteria in

awarding attorney's fees to appellees and the fee award should be reversed. We find no error and affirm.

Appellant is the father of a son, T.M., who was eight years old at the time of the contempt motions. Appellant was divorced from T.M.'s mother who was the custodial parent subject to appellant's visitation. T.M.'s mother died unexpectedly of natural causes in April 2004, and T.M. began living with his father, his step-mother, and two step-siblings.

Appellees Lonnie and Kathy McNatt are T.M.'s maternal grandparents. Shortly after their daughter's death, appellees filed a petition to establish grandparents' visitation. A hearing was held on the petition on May 24, 2004, and the court announced its ruling from the bench on that day. The written order setting out the ruling of the court was entered on July 13, 2004, and ordered extensive and open contact between the child and his maternal grandparents, including notice of the child's activities, and visitation between the appellees and the child. This order established a visitation schedule, ordered telephone access to T.M. for appellees, ordered appellant to arrange counseling for T.M., ordered the parties to follow the recommendations of T.M.'s counselor as to what extent appellees and appellant should participate in the counseling, and ordered the parties to act in consideration of T.M.'s best interests. There was no appeal from that order.

On August 16, 2004, appellees filed a motion for contempt alleging that appellant was not allowing them telephone contacts as ordered and that appellant had failed to arrange for counseling as ordered. Appellant denied the allegations and filed a counter-motion for contempt. This counter-motion alleged that appellees were in contempt for making disparaging remarks about appellant to T.M. and that appellees were in contempt for contacting appellant's and his wife's State employer to falsely accuse appellant's wife of misusing State time and equipment to assist appellant in his

case. Appellant asked the court to enjoin appellees from any further contact with his or his wife's employers.

Hearings on the motions were held on December 4, 2004 and February 2, 2005. The order setting out the court's rulings from the bench was entered on March 3, 2005. The court ruled that appellant was in contempt for not providing the court-ordered telephone access, for failing to arrange counseling for T.M. immediately, and for failing to advise appellees of T.M.'s activities. The court found that appellees used poor judgment in contacting the employer, but did not find them in contempt, and denied appellant's request to enjoin appellees from future contact with his or his wife's employers.

Subsequent to the contempt hearings, appellees filed a petition for attorney's fees seeking fees and costs totaling $5757.61, and appellant challenged those fees on reasonableness while asserting that over $2000 of the fees requested were unrelated to the contempt matter. He also filed a motion seeking findings of fact, conclusions of law, and additional findings. The written order that was entered March 3 awarded appellees the entire amount of fees requested and was entered without a hearing, although a hearing had been requested. Appellant filed a motion for reconsideration and a hearing was held on May 31, 2005. The court ruled that appellant's motions were deemed denied by operation of the rules of civil procedure, but stated that the court had considered all pending pleadings and correspondence before the court entered the order on the contempt motions.

We give special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses in child custody cases. *See Camp v. McNair*, ___ Ark. App. ___, ___S.W.3d. ___ (Nov. 16, 2005). In the trial court's underlying order awarding grandparent visitation to appellees, the trial court stated that it found appellees' testimony to be credible and believable on all issues, and that it found appellant's testimony to be less than credible and, at times

on certain issues, to be incredible. In the order appealed from herein, the trial court stated specifically regarding appellant's testimony on the issue of counseling that appellant was not credible and that appellant had further destroyed what little credibility he had with the trial court by his attempts to mislead the court.

For his first point on appeal, appellant argues that because the court found appellant in willful contempt and ordered him unconditionally to pay appellees' attorney's fees, the court's order was a criminal contempt ruling. We disagree. As appellant correctly states, criminal contempt punishes, while civil contempt coerces. *Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002), (*quoting Baggett v. State*, 15 Ark. App. 113, 690 S.W.2d 264 (1985)). In determining whether a particular action by a judge constitutes criminal or civil contempt, the focus is on the character of relief rather than the nature of the proceeding. *Fitzhugh v. State,* 296 Ark. 137, 138, 752 S.W.2d 275, 276 (1988).

It is within the inherent power and jurisdiction of a court of equity to allow attorney's fees in matters not specifically covered by that statute, including contempt proceedings. *Finkbeiner v. Finkbeiner,* 226 Ark. 165, 288 S.W.2d 586; 117 (1956); *Gusewelle v. Gusewelle*, 229 Ark. 191, 313 S.W.2d 838 (1955); *Feazell v. Feazell*, 225 Ark. 611, 284 S.W.2d 117 (1955). Allowance of fees under this inherent power was one that was vested within the sound discretion of the trial court. *Payne v. White*, 1 Ark. App. 271, 277, 614 S.W.2d 684 (1981).

Although the trial court's order uses the word punishment in rendering its decision, the order states that as punishment, the court "hereby orders and directs Defendant to comply with all Orders of the Court in the future and admonishes Defendant that he has had his one bite at the apple in this Court. If Defendant violates the Court's Orders again in the future, Defendant shall be punished severely for doing so." This admonishment of the court was nothing more than a warning that continued violations of the court's order would result in severe penalties.

The contempt involved here is civil contempt, which compels compliance with the court's order for the benefit of private parties. *See Omni Holding & Dev. Corp. v. 3D.S.A., Inc*., 356 Ark. 440, 156 S.W.3d 228 (2004). The standard of review for civil contempt is whether the finding of the circuit court is clearly against the preponderance of the evidence. *See id*. In *Johnson v. Johnson,* 343 Ark. 186, 33 S.W.3d 492 (2000), our supreme court observed that where a person is held in contempt for failure or refusal to abide by a court's order, the reviewing court does not look behind the order to determine whether it is valid. The court said:

> The fact that a decree or order is erroneous does not excuse disobedience on the part of those who were bound by its terms until reversed. However, if the contemnor was making a legitimate and successful challenge to the validity of the order, we may look beneath the order and recognize substantive error as a defense to contempt. On the other hand, if the contemnor merely refused to comply with an order that was clearly within the judge's jurisdiction and power, we will not look behind that order.

Johnson, 343 Ark. at 197, 33 S.W.3d at 498-99 (internal citations omitted).

Appellant never challenged the underlying court order. Therefore, we do not look behind that order in examining the contempt allegation. Disobedience of a valid court order is contemptuous behavior. *See Omni Holding & Dev. Corp. v. 3D.S.A., Inc., supra.* We give the same force to the findings of the circuit court in contempt matters as in any other case. *See Dennison v. Mobley,* 257 Ark. 216, 515 S.W. 2d 215 (1974). Reviewing the findings and evidence of this case, we cannot say that the circuit court's order was clearly against the preponderance of the evidence.

The trial court found that appellant had willfully failed and refused to comply with its directive regarding telephone communication, finding that appellant had not permitted reasonable telephone contact between the child and appellees. While appellant argued that he had installed a land line to effect communication, that line was not installed until after appellees filed their motion for contempt. Appellees' testimony was that it was clear from their conversations with their

grandson that he was constrained by his environment to freely communicate with them when telephone contact was established. Appellant attempted to explain the earlier lack of phone contact on inadequate cell phone reception and that he never answered his cell phone; however, evidence at trial included appellant's cell phone records that showed that in the time period reviewed, appellant had answered seventy-one (71) phone calls but not one of appellees' initiated calls. Given this evidence, we cannot say that the trial court erred in finding appellant in contempt.

Neither do we find error in the trial court's finding that appellant was in contempt for failing to arrange counseling for the child in a timely manner. The trial court found that a three-month passage of time from May 24, 2004, until August 23, 2004, was not immediate. The court found it particularly troubling that appellant attempted to excuse the delay testifying that he could not have scheduled counseling because the child was with appellees for summer visitation. The trial court admonished that appellant could have scheduled counseling and notified appellees, who were ordered to cooperate with counseling and who could have taken the child to counseling, of the time and place of the arranged counseling. The trial court completely dismissed appellant's other excuses, one offered at the December 2004 hearing and the other offered at the February 2005 hearing, as incredible. Appellant argues that appellees presented no evidence whatsoever that the child suffered any detrimental effects as a result of the perceived delay in the start of counseling. Appellant cites no authority for the proposition that a petitioner for contempt must show harm from the lack of compliance to prevail. Accordingly, we find no error on that point.

For his third point of error, appellant argues that the trial court erred in not entering an order prohibiting appellees from contacting appellant's employer in the future. Although appellant asserts the trial court erred in failing to enjoin appellees from future acts, he fails to cite the applicable law governing injunctions and the proper application of those principles. He primarily argues that the

trial court's failure to restrain the appellees gives the appearance of unfairness. We do not consider points of error that are not supported by citations to law or well-reasoned argument. *Rigsby v. Rigsby*, 356 Ark. 311, 149 S.W.3d 318 (2004).

Appellant's fourth point alleges that the trial court erred in ruling that the statement of the child to daycare workers was inadmissible as hearsay. The statement reported by a daycare worker was in response to her question to the child as to how his visit with his grandparents had gone. The statement was, "Did you know that my dad took me from my grandparents?" Appellant argues that the only reasonable inference was that the appellees were the source of the statement and that the ruling prevented appellant from being able to present his evidence in support of his allegation that appellees violated the court order by making derogatory statements about appellant to the child. Appellant's argument by implication concedes that no other evidence would support his contention that appellees had made disparaging remarks about appellant to the child. We disagree with appellant's conclusion that the only reasonable inference from the statement was that appellees had made such remarks. Another reasonable inference would be that the child believed his dad had taken action resulting in the child's isolation from his grandparents which was the focus of the contempt proceeding. As the trial court admonished, the person from whom that statement should have been elicited was the child. Accordingly, we find no prejudicial error on that issue.

For his fifth point of error, appellant asserts that the trial court erred in admitting hearsay documents offered by appellees, while excluding hearsay documents offered by appellant, creating the appearance of bias. The evidence offered by appellant at trial that the trial court ruled as hearsay was a document from appellant's State medical insurance provider about the requirement for pre-certification for referrals for counseling services. The court ruled that the document was inadmissible hearsay, but took judicial notice of the pre-certification requirement since the court was

aware of the State insurance pre-certification requirement. Appellant complains that the trial court admitted a report card that the court believed was provided by appellant to appellees but which appellant asserted was stolen by appellees. Appellant argues that the trial court relied in part on the hearsay report cards in ruling that appellant was in contempt for failing to adequately notify appellees of school events. He argues that the ruling should be reversed due to the appearance of bias inherent in these evidentiary rulings, but does not assert that the trial court erred in finding appellant in contempt regarding his failure to properly notify appellees of events. We find no merit to appellant's argument.

For his sixth and final point on appeal, appellant alleges that the trial court failed to consider the applicable legal criteria in awarding attorney's fees to appellees and the fee award should be reversed. As discussed above, the trial court had the authority to enter attorney's fees . Appellant acknowledges that the trial court was aware of appellant's financial abilities, but disagrees with the trial court's award of fees citing appellant's obtaining a second mortgage to provide security for the payment of fees on this appeal. Appellant provides no law or authority for the proposition that a contemnor is excused from payment if he must obtain a loan to make the payment. Appellant also objects to the assertion of appellees' claim of attorney-client privilege insisting that they should provide details of phone-calls and meetings to prove entitlement to fees, focusing on certain itemized fees that he alleges were unrelated to this proceeding. We find no error. The trial court is in a better position to evaluate counsel's services than an appellate court, and, in the absence of clear abuse, the trial court's award of an attorney's fee will not be disturbed on appeal. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998). We find no such abuse.

Accordingly, we affirm on all points.

Affirmed.

VAUGHT and CRABTREE, JJ., agree.